BEFORE THE

DEPARTMENT OF TRANSPORTATION

WASHINGTON, D.C.

Joint Application of AMERICAN AIRLINES, INC. and BRITISH AIRWAYS PLC under 49 USC 41308 and 41309 for approval of and antitrust immunity for agreement	:	Docket OST-2001-10387
Joint Application of AMERICAN AIRLINES, INC. and BRITISH AIRWAYS PLC under CFR Part 212 for statements of authorization (blanket codesharing) and under 49 USC 40109 for related exemption authority	:	Docket OST-2001-10388

MOTION OF
CONTINENTAL AIRLINES, INC.
TO DISMISS

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August 30, 2001

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President Bush has committed to "insist on results" whenever "the people's money" is being spent.[1] Despite this commitment, the Department is being asked to embark on substantial expenditures of "the people's money" with absolutely no assurance of "results," repeating a mistake it made five years ago when British

[1] In his radio address Saturday, August 25, President Bush made this commitment to the American people, "We want to spend your hard-earned money as carefully as you do. And when we spend the people's money, we insist on results."

Airways[2] and American submitted essentially the same anticompetitive application for the same antitrust immunity. The Department ultimately dismissed that American/British Airways application after the government and more than 50 interested parties had spent vast sums on a proceeding which went nowhere because the "fundamental predicate" for consideration of codesharing or antitrust immunity for British Airways and American was missing. (Order 99-7-22 at 2) That predicate – a U.S.-U.K. open skies agreement and open entry for additional U.S. carriers at London Heathrow and London Gatwick airports – is still missing. Rather than instituting another wasteful proceeding to consider the anticompetitive American/British Airways applications, the Department should dismiss these applications without prejudice to resubmission by the applicants if and when the skies at London Heathrow and Gatwick are truly opened.

Continental states as follows in support of its motion for dismissal of the anticompetitive American/British Airways applications for antitrust immunity and codeshare authority.

1. The American/British Airways request for antitrust immunity is so anti-competitive that the Department must not rush to judgement. As the Department of Justice said when American/British Airways applied for the same antitrust immunity before, "If DOJ were reviewing the Alliance under the antitrust laws, we would oppose it" because the alliance would "significantly reduce

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[2] Common names are used for airlines.

competition in many U.S.-U.K. city-pairs without producing sufficient efficiencies to outweigh the harm" and "slot divestitures at London Heathrow could "reduce that harm" but "not eliminate it."[3] British Airways and American are again asking the Department to bless their plot to eliminate competition between them in the world's largest intercontinental aviation market, again basing their case on bogus claims that other airlines, including Continental, will be able to acquire slots and facilities freely at London Heathrow to mount substantial operations there and compete effectively with a combined American/British Airways monolith. To compete effectively with British Airways and American operating independently of one another, Continental would require at least 140 weekly competitive and economically viable London Heathrow slots and facilities under an open-skies agreement permitting Continental and other airlines to serve London Heathrow.[4] If British Airways and American were authorized to eliminate competition between

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[3] See Comments of the Department of Justice, Docket OST-97-2058, May 21, 1988 at 1.

[4] Continental would require 84 weekly London Heathrow slots to operate six daily roundtrip flights between New York/Newark and London Heathrow in competition with the eight daily roundtrip New York/Newark-London Heathrow flights now operated by British Airways alone and the seven daily roundtrip New York/Newark-London Heathrow flights now operated by American alone as well as retaining Continental's ability to continue providing service at London's Gatwick and Stansted airports to serve the separate market areas reached by each of the London airports. Continental would also require 42 weekly slots at London Heathrow for Houston services to compete with British Airways and American operations at Houston and Dallas/Fort Worth. Fourteen weekly frequencies are required for one daily London Heathrow flight at Cleveland, so

(continued…)

themselves, however, Continental would require additional slots, competitive facilities at London Heathrow and the ability to add even more flights to compete with the joint portfolio of slots at London Heathrow which would be used by British Airways and American to crush smaller competitors. Since the skies throughout the U.K. are already open except for flights serving the London Heathrow and Gatwick airports, an open-skies agreement which fails to provide truly open access at those two airports would be a pyrrhic victory for the U.S. and a crushing defeat for consumers of air transportation.

Based on requests for access at London Heathrow from the previous proceedings on British Airways and American applications, the Department already knows that over 600 weekly slots, and facilities to operate the resulting flights, would be required to meet the minimum requirements of additional carriers at London Heathrow alone. Anything short of this level of access means that skies at London Heathrow are not open. Facing the possibility of a monumental duopoly at London Heathrow restricting access commercially at London Heathrow as significantly as access has been restricted by Bermuda II, the Department and the parties should not again be required to spend vast sums until the fundamental predicate of truly open skies at London Heathrow and London Gatwick has been achieved. Thus, the Department should immediately dismiss the anticompetitive

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(…continued)
Continental can offer beneficial London Heathrow competition for connecting

(continued…)

American/British Airways applications without prejudice to resubmission if and when access at London Heathrow and Gatwick is truly open to airlines such as Continental.

2. The last American/British Airways antitrust-immunity proceeding was terminated two years ago because the Department concluded "the fundamental predicate for processing the . . . applications" – truly open U.S.-London skies – did not exist. (Order 97-3-34 at 7) That "fundamental predicate" is as absent now as it was two years ago. The Department would be putting the cart before the horse again by accepting and considering antitrust immunity applications contingent not only on a U.S.-U.K. open skies agreement but also on truly open access to London Heathrow and Gatwick airports. The Department must have learned by now that it cannot reasonably "assume the existence, *de jure* and *de facto*, of an Open Skies agreement meeting U.S. objectives," including "adequate provision for new and expanded U.S. carrier service through London airports, particularly Heathrow" for purposes of evaluating antitrust immunity and codesharing between American and British Airways. Years of tireless efforts by U.S. negotiators have been rewarded with neither an open-skies agreement nor any hope of access to London Heathrow and Gatwick airports sufficient to create a truly enhanced multi-carrier competitive environment for U.S.-London passengers. Indeed, U.S.-U.K. open-skies

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(…continued)
passengers using other midwestern hubs.

negotiations have been riddled by false starts and disappointing stops, and further negotiations are not even scheduled.

Last time around, American and British Airways led the Department down a primrose path which generated 444 docket submissions and 25 notices and orders, occupying the time of more than 50 interested parties over a period of two and a half years without any progress toward a standard open skies agreement, much less the true opening of London Heathrow and Gatwick airports essential to bringing meaningful competition to these critical U.S.-London routes. The Department should not repeat the mistake of instituting proceedings on an antitrust immunity application before adequate access to London Heathrow and Gatwick airports is ensured. Consideration of the American/British Airways applications will be another waste of the time and resources of both the U.S. Government and the parties whose interests are at stake unless London Heathrow and Gatwick are opened to full competitive entry by other U.S. airlines. So long as American and British Airways and their allies continue to resist effective opening of London Heathrow and Gatwick, those airlines should be denied the benefits of open skies, including the right to consideration of applications based on principles which apply only to markets which are truly open and competitive.

3. The Department's rationale for considering the first American/British Airways antitrust immunity application without open skies was flawed then, as history has demonstrated, and even worse now. In the last American/British Airways proceeding, the Department acknowledged "the possible risks to interested

parties and the Department of proceeding, with all the burdens of a complex case, before finalization of an Open-Skies agreement, an essential prerequisite to a decision on the merits of the applications." (Order 97-3-34 at 7) The Department decided, however, these burdens were "outweighed" by other considerations (Order 97-3-34 at 7), including the controversy and complexity of the American/British Airways applications[5] and the unique requirement to allocate slots for service by U.S. airlines at London Heathrow.[6] These considerations justify dismissing the applications now, not expediting consideration of them. The extensive controversy and complexity of any proceeding to consider applications for relief as anticompetitive as that sought by American and British Airways means the Department and the parties would be burdened with building an extensive record for naught – again.

The record developed in connection with the last American/British Airways applications demonstrates that any immunized alliance between them would be so anticompetitive that their applications should be denied. Truly open access at

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[5] The Department justified getting a head start on considering the American/British Airways applications because "the importance and complexity of the issues, the likely size of the record, and the number of parties expected to participate all suggest that this application will be difficult to process in a timely manner" and "the proposed Alliance has already generated substantial controversy." (Order 97-3-34 at 7-8)

[6] The Department said "there is a clear need to assure *de facto* competitive access to Heathrow Airport" which "will likely require us to administer an allocation of slots among interested U.S. carriers through additional procedures, a step not necessary in previous alliance cases." (Order 97-3-34 at 7-8)

London Heathrow and Gatwick must be ensured before any consideration is given to antitrust immunity for the largest airline at London Heathrow – British Airways – and the largest airline in the entire world – American. Moreover, the complexity of these issues and the strength of these concerns suggest that the Department should not again consider them in a vacuum but instead should await the fundamental predicate of truly open skies at London Heathrow and Gatwick before even considering any antitrust immunity applications between airlines capable of creating the same dominance at London Gatwick by their collective market power as that created in the past by Bermuda II. To compete against each of the behemoths now operating independently at London Heathrow, Continental would require 140 weekly competitive and economically viable Heathrow slots and facilities. To compete effectively against a combined American/British Airways, Continental would also require the ability to add flights at both London Heathrow and London Gatwick freely as that dominant combine adds U.S.-London flights. The Department should not even consider the American/British Airways application until an open-skies agreement has been signed and it is clear airlines instituting flights at London Heathrow for the first time can operate as many flights as they require to meet market demand, compete with this gigantic alliance if it is approved and expand their operations and facilities as needed in the future.

4. The last American/British Airways application for antitrust immunity was the only such application the Department has considered without ensuring in advance competitive access to the primary airports in the foreign countries

involved.[7] The fact that U.S.-U.K. aviation issues are complex and raise substantial concerns is not a justification for abandoning the Department's precedent in other antitrust-immunity cases. If the U.S. and U.K. sign an open-skies agreement that introduces effective competition, the Department can institute proceedings at that time and begin considering the American/British Airways applications in light of then current competitive conditions. Since the terms of the U.S.-U.K. open-skies agreement and provisions for London Heathrow and London Gatwick slots and facilities would be known, review of the applications could be based on knowledge, not a guess at what the U.S.-U.K. agreement might say and what access might

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[7] See Order 93-1-1 (U.S.-Netherlands open skies September 4, 1992; Northwest and KLM applied September 9, 1992; application approved January 11, 1993), Orders 96-6-33 and 2000-5-13 (U.S.-Austria/Belgium/Switzerland open skies June 15, 1995; Delta, Swissair, Sabena and Austrian applied September 8, 1995; American, Swissair and Sabena applied November 19, 1999; applications approved June 14, 1996 and May 11, 2000), Orders 96-7-2 and 97-9-21 (U.S.-Canada open skies February 24, 1995; American and Canadian applied November 3, 1995; United and Air Canada applied June 4, 1996; applications approved July 15, 1996 and September 19, 1997), Order 96-5-27 (U.S.-Germany open skies February 29, 1996; United and Lufthansa applied February 29, 1996; application approved May 20, 1996), Order 96-11-1 (U.S.-Denmark/Norway/Sweden open skies April 26, 1995; United and SAS applied May 28, 1996; application approved November 1, 1996), Order 99-9-9 (U.S.-Chile open skies October 28, 1997; American and LanChile applied December 23, 1997; application approved September 13, 1999), Order 99-12-5 (U.S.-Italy open skies November 11, 1998; Northwest, Alitalia and KLM applied May 11, 1999; application approved September 13, 1999); Order 2000-10-12 (U.S.-Malaysia open skies June 21, 1997; Northwest and MAS applied January 13, 2000; application approved October 13, 2000), Order 2001-4-2 (U.S.-New Zealand open skies June 18, 1997; United and Air New Zealand applied December 17, 1999; application approved April 3, 2001) and Order 2001-5-1 (U.S.-Panama open skies March 12, 1997; Continental and COPA applied December 22, 2000; application approved May 3, 2001).

become available. Allowing this proceeding to continue would require building an enormous evidentiary record in a highly uncertain, speculative context, and would be counterproductive. Premature consideration of the American/British Airways applications would also raise due-process concerns because airlines such as Continental with substantial interests in the proceedings would be denied the opportunity to develop a record knowing the terms on which the U.S. and U.K. had agreed to open skies.

5. If the Department does not dismiss the American/British Airways application outright, the Department must, at a minimum, defer answers to the application and suspend the procedural schedule until the U.S. and the U.K. sign an agreement allowing airlines such as Continental to operate as many flights at London Heathrow and Gatwick as they require to ensure effective competition. Moreover, no party will be harmed by such a delay, since the current schedule established by the Department will be impossible to maintain in any event.

As it stands now, the Department's procedural schedule imposes an untenable burden on interested parties, including Continental, and denies them the due process to which they are entitled. The procedural schedule requires interested parties to evaluate the American/British Airways applications without even knowing what the U.S.-U.K. agreement would say and how it would resolve the complex issues of London Heathrow access and other substantial competitive concerns. In this vacuum, the procedural schedule forces interested parties to speculate on the significance of the confidential information and guess what

competitive implications should be drawn from it. Moreover, the confidential documents submitted by American and British Airways are too voluminous and dense to allow counsel and outside experts to analyze them properly and prepare answers in the fifteen business days they are available for review before answers to the American/British Airways application are due. The index to the confidential documents alone is 77 pages and the documents total more than 18,000 pages, filling more than a dozen boxes. Unlike the confidential information submitted in other antitrust-immunity proceedings, American has not cross-referenced its confidential information to the Department's information requests. Thus, American has deprived interested parties of the ability to determine if American has satisfied the evidentiary requirements and if the Department's finding that the record is substantially complete is correct.[8] Unlike the last American/British Airways proceeding, where the Department said adequate document review facilities were required to alleviate due process concerns,[9] the Department has only one individual-sized cubicle in the Documentary Services Division available for inspection of documents during normal business hours, which severely constrains

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[8] British Airways belatedly submitted such an index on August 24.

[9] In the last American/British Airways proceeding, the Department recognized this "due process concern," and American and British Airways made confidential materials available at other locations. (See the Department's Preliminary Antitrust Immunity Evidence Request from Regis P. Milan, Chief, Economic and Financial Analysis Division, Office of Aviation Analysis, to Carl B. Nelson, Jr., American Airlines, and Jeffrey W. Jacobs, counsel for British Airways, Docket OST-97-2058, November 26, 1996, at 2)

the ability of interested parties to study and analyze confidential information. Under these conditions, review of the confidential documents by interested parties will take even longer than in the last American/British Airways proceeding, where parties were given more than thirteen months to review confidential information before answers were due. Starting on March 28, 1997, interested parties were allowed to review confidential information not only at the Department but also at the offices of counsel for American and British Airways. The procedural schedule was set on March 30, 1998, then extended. Interested parties were then allowed thirty days to submit answers and twenty-one days after the answer date to submit replies. (See Orders 97-3-42 at 4-5, 98-3-31 at 4-5 and 98-5-7 at 5) If interested parties do not have sufficient time to review the confidential documents in this case, they would be denied due process, and the Department's decision on the American/British Airways application would be unlawful.

WHEREFORE, Continental asks the Department to dismiss the American/British Airways applications or defer consideration of them unless and until the U.S. and U.K. reach an agreement fully opening London's Heathrow and Gatwick airports.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have this date served the foregoing document on all parties served with the American/British Airways applications in accordance with the Department's Rules of Practice.

/s/ Thomas Newton Bolling

Thomas Newton Bolling

August 30, 2001

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